

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>LESTER H. and MARJORIE L. KLAUBER</b>	:	DETERMINATION DTA NO. 815295
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law for the Years	:	
1979, 1980, 1981 and 1984.	:	

---

Petitioners, Lester H. and Marjorie L. Klauber, 221 McDonald Avenue, Apt. 6-C, Brooklyn, New York 11218, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1979, 1980, 1981 and 1984.

The Division of Taxation, by its representative Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel) brought a motion dated June 4, 1997 for an order of summary determination in the above-referenced matter. Pursuant to section 3000.5(d) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, petitioners had 30 days to file a response. Petitioners, represented by Leon Berg, CPA, did not respond to the motion. Accordingly, the 90-day period for issuance of this determination began on July 7, 1997. Based upon the motion papers, the affirmation and affidavit submitted therewith, and all pleadings and documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claims for refund of tax paid on Federal pension income as untimely pursuant to Tax Law § 687(a).

FINDINGS OF FACT

1. On November 26, 1994 petitioners, Lester H. and Marjorie L. Klauber, filed separate claims for refund of taxes paid on Federal pension income for the years 1979, 1980, 1981 and 1984. On January 30, 1995, the Division of Taxation ("Division") issued a Notice of Disallowance to petitioners denying their claims for refund on the basis that such claims had not been filed within three years of the filing of petitioners' tax returns for the years at issue.

2. After a Bureau of Conciliation and Mediation Services ("BCMS") conciliation conference, the conferee issued a Conciliation Order (CMS No. 149267) dated June 14, 1996, denying petitioners' request and sustaining the Notice of Disallowance.

3. On August 26, 1996, petitioners filed a petition which challenged the Division's denial of their refund claims for the years 1979, 1980, 1981 and 1984. In their petition, petitioners set forth the following argument:

"Taxpayer is claiming refund of New York State Income Tax paid on Federal Pension Plan income for the years 1979, 1980, 1981 and 1984. This claim should be allowed pending resolution of litigation in Supreme Court regarding Chapter 664 of laws [sic] of 1989 (tax law). New York State Appellate [sic] Court ruled in this matter in 1994 and also Governor Cuomo concurred with this ruling. The Statue [sic] of Limitations should have started in 1994, and my claim should be allowed since it was filed within this eligible period."

4. The Division served an answer to the petition on November 13, 1996. The Division denied the allegations contained in the petition and affirmatively stated that petitioner Lester H. Klauber was a Federal employee who paid tax on his Federal pension income for the years in issue, that petitioners' claim for refund for such years was denied as untimely, and that any instances where refunds were approved for those who paid New York State income tax on Federal pension income were limited to instances where timely refund claims had been filed.

5. The Division's motion for summary determination is supported by the affirmation of Peter T. Gumaer, sworn to the 3rd day of June 1997 and the affidavit of Charles Bellamy, sworn to the 3rd day of June 1997.

Mr. Bellamy is employed by the Division as a Tax Technician II in its Audit Division. His responsibilities include reviewing and processing refund claims filed by taxpayers who paid tax on Federal pension income. Mr. Bellamy, in his affidavit, attests that: 1) petitioners timely filed their 1979, 1980, 1981 and 1984 personal income tax returns (i.e., filed their returns for such years on or before April 15, 1980, 1981, 1982 and 1985, respectively); 2) filed claims for refund of taxes paid on Federal pension income for the years 1979, 1980, 1981 and 1984 on November 26, 1994; and 3) failed to file any claims for refund or amended returns for the years 1979, 1980, 1981 and 1984 at any time prior to November 26, 1994.

Mr. Gumaer, in his affirmation, asserts that since petitioners did not file refund claims or amended returns for their personal income taxes for the years 1979 through 1981 and 1984 within three years from the time the returns were filed or two years from the time taxes were paid, whichever is later, pursuant to Tax Law § 687, petitioners' refund claims should be barred as untimely, the petition before the Division of Tax Appeals should be denied with prejudice and

the motion for summary determination should be granted.

6. Petitioners did not respond to the Division's motion for summary determination.

### CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b) after issue has been joined. The regulations provide that the motion may be granted if the movant has sufficiently established that no material and triable issue of fact is present, and the motion may be denied "if any party shows facts sufficient to require a hearing of any material and triable issue of fact" (20 NYCRR 3000.9[b][1]). Petitioners, who did not respond to the Division's motion, have not shown facts sufficient to require a hearing on whether they filed refund claims for 1979 through 1981 and 1984 within three years of their filing tax returns for such years. Therefore the facts as set forth by the Division in its moving papers are deemed admitted (see, *Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667). Accordingly, inasmuch as there are no material and triable issues of fact presented, a determination may be issued, as a matter of law, in favor of any party.

B. On March 28, 1989, the United States Supreme Court issued a decision in the case of *Davis v. Michigan Dept. of Treasury* (489 US 803, L Ed 2d 891). The Davis decision held that a state violates the constitutional doctrine of intergovernmental tax immunity when the state taxes retirement benefits paid by the Federal government but exempts from taxation retirement benefits paid by the state or its political subdivisions. The Davis decision did not address the issue of retroactive application of its holding.

At the time of the Davis decision, New York Tax Law § 612(c)(former [3]) exempted State and local pensions from taxation; however, there was no similar provision for Federal

pensions. As a result of Davis, the New York State Legislature amended the Tax Law, effective January 1, 1989, to exclude Federal pensions from New York income tax (see, L 1989, ch 664; Tax Law § 612[c][3][ii]). This exemption was to apply beginning with tax year 1989. At that time, the Division of Taxation also took the position that the Davis decision applied prospectively only and denied all claims for refund of tax paid on Federal pensions for years prior to 1989 even where timely claims were filed. Litigation on the issue of whether the Davis holding should be applied retroactively ensued in New York and throughout the country (see, *Duffy v. Wetzler*, 148 Misc 2d 459, 555 NYS2d 543, mod 174 AD2d 253, 579 NYS2d 684, appeal dismissed 80 NY2d 890; 587 NYS2d 900, revd 509 US 917, 125 L Ed 2d 716, on remand 207 AD2d 375, 616 NYS2d 48, lv denied 84 NY2d 838, 617 NYS2d 129, cert denied 513 US 1103, 130 L Ed 2d 673).

C. Subsequent to the *Duffy v. Wetzler* decision, the issue of how to apply the Davis holding was resolved in *Harper v. Virginia Dept. of Taxation* (509 US 86, 125 L Ed 2d 74). The Supreme Court in *Harper* held that the rule announced in *Davis* was to be given full retroactive effect; however, it did not provide relief to the petitioners therein. Rather, citing to *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco* (496 US 18, 100 L Ed 2d 17), the Supreme Court held that a state was free to choose the form of remedy it would provide to rectify any unconstitutional deprivation, but that such a remedy must satisfy the demands of Federal due process (*Harper v. Virginia Dept. of Taxation*, *supra* at 101, 125 L Ed 2d at 88-89). In this context, Federal due process requires that where taxes are paid pursuant to a scheme ultimately found unconstitutional, the state must provide taxpayers with "meaningful retrospective relief" from taxes, meaning that in refund actions the state must afford taxpayers a "fair" opportunity to

challenge the accuracy and legal validity of the tax and a "clear and certain remedy" for any erroneous or unlawful tax collection (see, *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, supra at 39, 110 L Ed 2d at 37-38).

D. Following the Supreme Court decision in *Harper v. Virginia Dept. of Taxation* (supra), the State of New York, in June 1994, decided to pay full refunds plus interest to the approximately 10,000 Federal retirees who paid State income taxes on their Federal pensions prior to 1989 pursuant to tax provisions that were later determined to be unconstitutional in *Davis v. Michigan Dept. of Treasury* (supra), and who had filed timely administrative claims for refunds for those taxes with the Department of Taxation and Finance (*Duffy v. Wetzler*, 207 AD2d 375, 616 NYS2d 48, supra). Thus, in response to the *Davis* and *Harper* decisions, the State amended the statute to conform to the rulings and granted refunds to those Federal retirees who had filed timely refund claims.

E. Tax Law § 687(a) controls refunds of overpayments of income tax in New York and provides, in pertinent part, as follows:

"Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid."

F. Petitioners do not dispute that their refund claims for the years at issue were not filed until November 1994. Rather, they assert, in their petition, that the statute of limitations for refund claims filed by Federal pension recipients should have commenced in 1994. The issue is thus whether the Tax Law § 687 statute of limitations may be enforced where the statute

imposing the tax is later found to be unconstitutional. The Supreme Court held in *McKesson* that a relatively short statute of limitations is sufficient for due process requirements, citing the example of a Florida refund statute which imposes a three-year statute of limitations (*McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, supra at 24, 110 L Ed 2d at 28, note 4, citing Fla Stat § 215.26[2]; *City of Miami v. Florida Retail Federation, Inc.*, 423 So 2d 991, 993). Clearly, New York's three-year statute of limitations meets the Supreme Court's due process requirements as set forth in *McKesson*. (See, *Matter of Burkhardt*, Tax Appeals Tribunal, January 9, 1997; *Matter of Jones*, Tax Appeals Tribunal, January 9, 1997; *Matter of Silverman*, Tax Appeals Tribunal, January 9, 1997.) Accordingly, petitioners' contention that the relevant limitations period should not be applied is rejected.

G. Petitioners did not file any refund claims for the years at issue within the three-year limitations period. Indeed, their refund claims for tax years 1979, 1980, 1981 and 1984 were filed on November 26, 1994, long after the statute of limitations for all four tax years had expired. The Tax Appeals Tribunal has consistently held, in every case brought before it to date by Federal retirees, that refunds cannot be granted unless a timely claim has been filed (see, *Matter of Epstein*, Tax Appeals Tribunal, March 27, 1997; *Matter of Hinds*, Tax Appeals Tribunal, February 13, 1997). There being no material facts at issue and the Division being entitled to summary determination on the law, petitioners' claims for refund of personal income tax for the years 1979, 1980, 1981 and 1984 are barred and were properly denied as untimely filed pursuant to Tax Law § 687.

H. The Division's Motion for Summary Determination is granted, the petition of Lester H. and Marjorie L. Klauber is denied, and the Division's Notice of Disallowance of petitioners'

refund claims for the years 1979, 1980, 1981 and 1984 is sustained.

DATED: Troy, New York  
August 21, 1997

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE